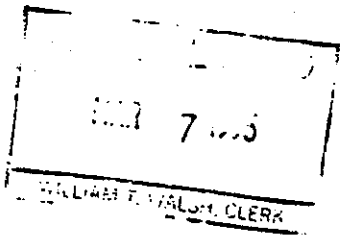


FW8888

PITNEY, HARDIN, KIPP & SZUCH
(MAIL TO) P.O. BOX 1945, MORRISTOWN, N.J. 07962-1945
(DELIVERY TO) 200 CAMPUS DRIVE, FLORHAM PARK, N.J. 07932-0950
(201) 966-6300
ATTORNEYS FOR Defendant AT&T Corp.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., a Florida corporation,	:	
AND	:	
WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC., 800 DISCOUNTS, INC. and New Jersey corporations,	:	CIVIL ACTION NO. 95-908 (NHP)
AND	:	
PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., a Pennsylvania corporation,	:	CERTIFICATION OF RICHARD R. MEADE
Plaintiffs,	:	
v.	:	
AT&T CORP., a New York corporation,	:	
Defendant.	:	

RICHARD R. MEADE, of full age, hereby certifies as follows:

1. I am an attorney-at-law of the State of New Jersey and am a Senior Attorney with defendant AT&T Corp. As such, I have personal knowledge of the facts and proceedings set forth herein.

2. I submit this Certification in connection with AT&T's Brief In Opposition To Plaintiffs' Motion For A Temporary Restraining Order.

3. On February 16, 1995, AT&T Corp. filed Tariff Transmittal No. 8179 with the Federal Communication Commission ("FCC"). A copy of that transmittal is attached hereto as Exhibit A. A copy of my letter to David Nall, Deputy Chief of the Commission's Common Carrier Bureau, Tariff Division regarding the transmittal is attached hereto at Exhibit B.

4. In connection with Tariff Transmittal No. 8179, seven entities (including three of the plaintiffs in this matter) filed Petitions to Reject or Suspend and Investigate with the FCC.

5. On February 21, 1995, I received a copy of the Petition To Reject or Suspend and Investigate of Winback & Conserve Program, Inc., which was filed with the FCC in connection with AT&T's Tariff Transmittal No. 8179. A copy of this petition is attached hereto as Exhibit C.

6. On February 22, 1995, I received a copy of the Petition To Reject of Combined Companies, Inc., which was filed with FCC in connection with AT&T's Tariff Transmittal No. 8179. A copy of this petition is attached hereto as Exhibit D.

7. On February 22, 1995, I received a copy of the Petition To Reject or Suspend and Investigate of Public Services Enterprises of Pennsylvania, Inc., which was filed with the FCC in connection with AT&T's Tariff Transmittal No. 8179. A copy of this petition is attached hereto as Exhibit E.

8. On February 27, 1995, AT&T Corp. filed with the FCC its Reply to the Petitions to Reject or Suspend and Investigate. A copy of this Reply is attached hereto as Exhibit F.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.

RICHARD R. MEADE

DATED: March 6, 1995

A

M. P. Dal Cassino
Administrator - Rates and Tariffs

Room 3D055
55 Corporate Drive
Bridgewater, NJ 08807
908 658-3861

February 14, 1995

Transmittal No. 8179

Secretary
Federal Communications Commission
Washington, DC 20554

Attention: Common Carrier Bureau

The accompanying tariff material issued by AT&T Communications and bearing Tariff F.C.C. Nos. 1 and 2, effective March 2, 1995, is sent to you for filing in compliance with the requirements of the Communications Act of 1934, as amended. This material consists of tariff pages as indicated on the following check sheets:

Tariff F.C.C. No. 1 - 3326th Revised Page 1
Tariff F.C.C. No. 1 - 276th Revised Page 1.4
Tariff F.C.C. No. 2 - 1140th Revised Page 1

This filing modifies language pertaining to Transfer or Assignment regulations.

A continuing waiver of Section 61.74 of the Federal Communications Commission's Rules and Regulations was requested under Application No. 1328 and has been granted under Special Permission No. 93-48.

Notification to customers of rate increases is being made through advertisements scheduled to appear within the next two business days in general circulation daily newspapers in major metropolitan areas throughout the country (including USA Today and the national editions of the Wall Street Journal and the New York Times).

Acknowledgment and date of receipt of this filing are requested to the address below. A duplicate letter of transmittal is attached for this purpose. Petitions can be served either by facsimile (908-953-8360) to the attention of Mr. R. Meade or in person to Mr. M. F. DalCassino, Administrator - Rates and Tariffs, AT&T Communications, 55 Corporate Drive, Room 3D55, Bridgewater, NJ 08807.

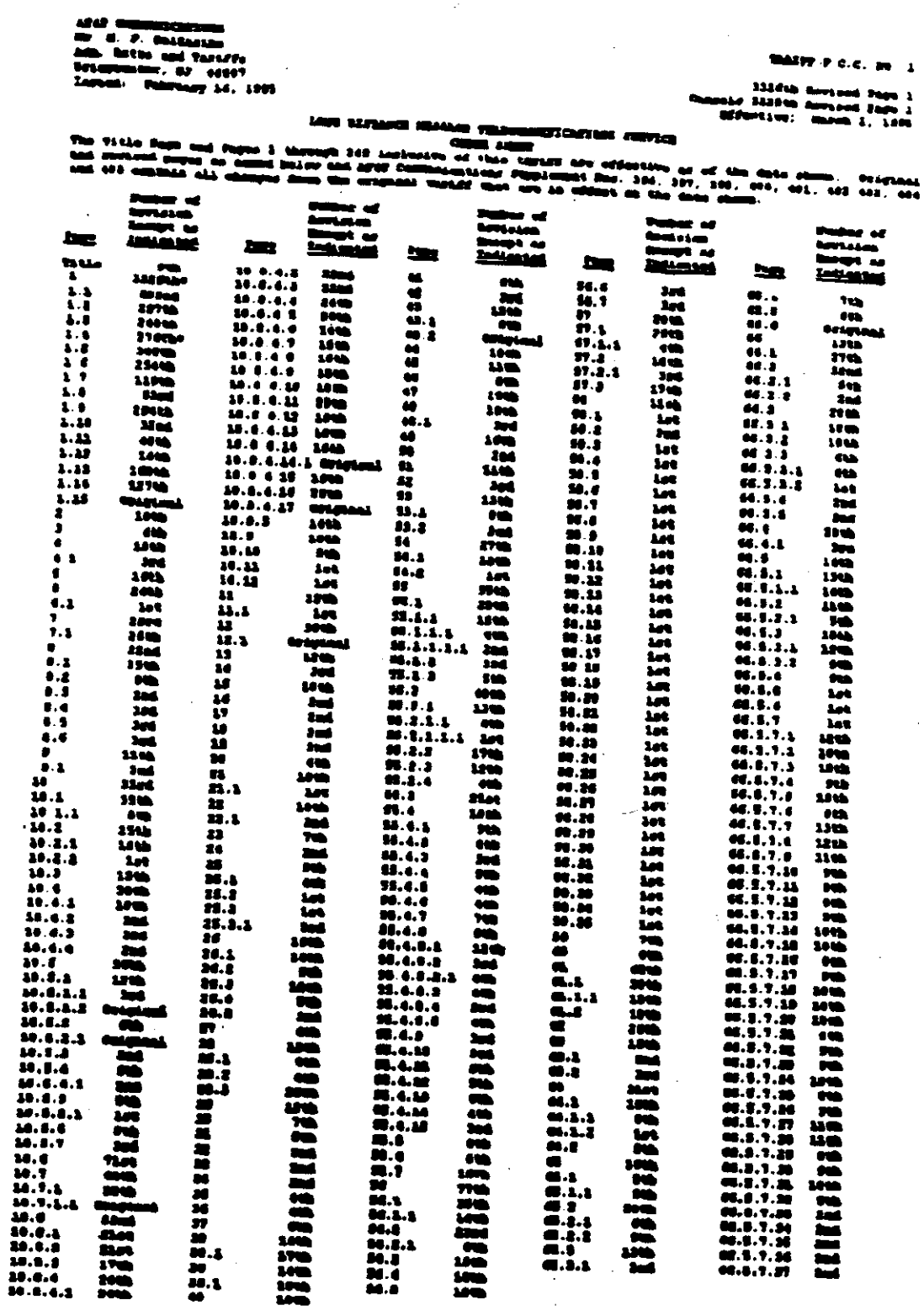
Administrator - Rates and Tariffs

Duplicate Letter
Attachment:
Tariff Pages (6)
Copy of Letter, with attachment, concurrently sent to:
Commercial Contractor
Chief, Tariff Review Branch, Public Reference Copy

cc: Francine Pagan

G3

P.02



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6.2.5. Provision of Services (continued)

B. **Installation** - When installation of a component is required it will be installed subject to the availability of installation personnel and equipment. Installations will usually be made during normal working hours. For AT&T OPTIMUM Service, an Installation Guarantee is provided as specified in Section 6.17.6. following. For AT&T CustomNet GOLD Service, an Installation Guarantee is provided as specified in Section 6.21.5., following.

C. **Maintenance** - The Company will maintain and repair the services which it provides, at no additional charge, except as specified in AT&T UNIPLAN Basic Service Option as specified in Section 6.19.5. following. For AT&T OPTIMUM Service, a Maintenance Guarantee is provided as specified in Section 6.17.5. following. For AT&T CustomNet GOLD Service a Maintenance Guarantee is provided as specified in Section 6.21.5., following. 3x 5x

D. **Hazardous Locations** - A Company-provided access line will not be furnished at a location the Company considers hazardous (e.g., explosive atmosphere environments). In such cases, the Company, if so requested, will terminate the access line at a mutually agreeable alternate location. The Customer will then be responsible for extension of the access line to the hazardous location.

6.2.6. **Transfer or Assignment** - Custom Network Services may be transferred or assigned to a new Customer, provided that:

A. The Customer of record (former Customer) requests in writing that the Company transfer or assign the service to the new Customer.

B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service, and (2) the unexpired portion of any applicable minimum payment period(s), including the unexpired portion of any term of service and usage or revenue commitment(s).

C. The service is not interrupted or relocated at the time the transfer or assignment is made.

D. The Company agrees in writing to the transfer or assignment.

The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for the service, and (2) the unexpired portion of any applicable minimum payment period(s), including the unexpired portion of any term of service and usage or revenue commitment(s).

[illegible] appearing previously [illegible] on this page [illegible] found on Page 150.1.
[illegible] filed under Transmittal No. 5230 [illegible] effective on February 20, 1995.

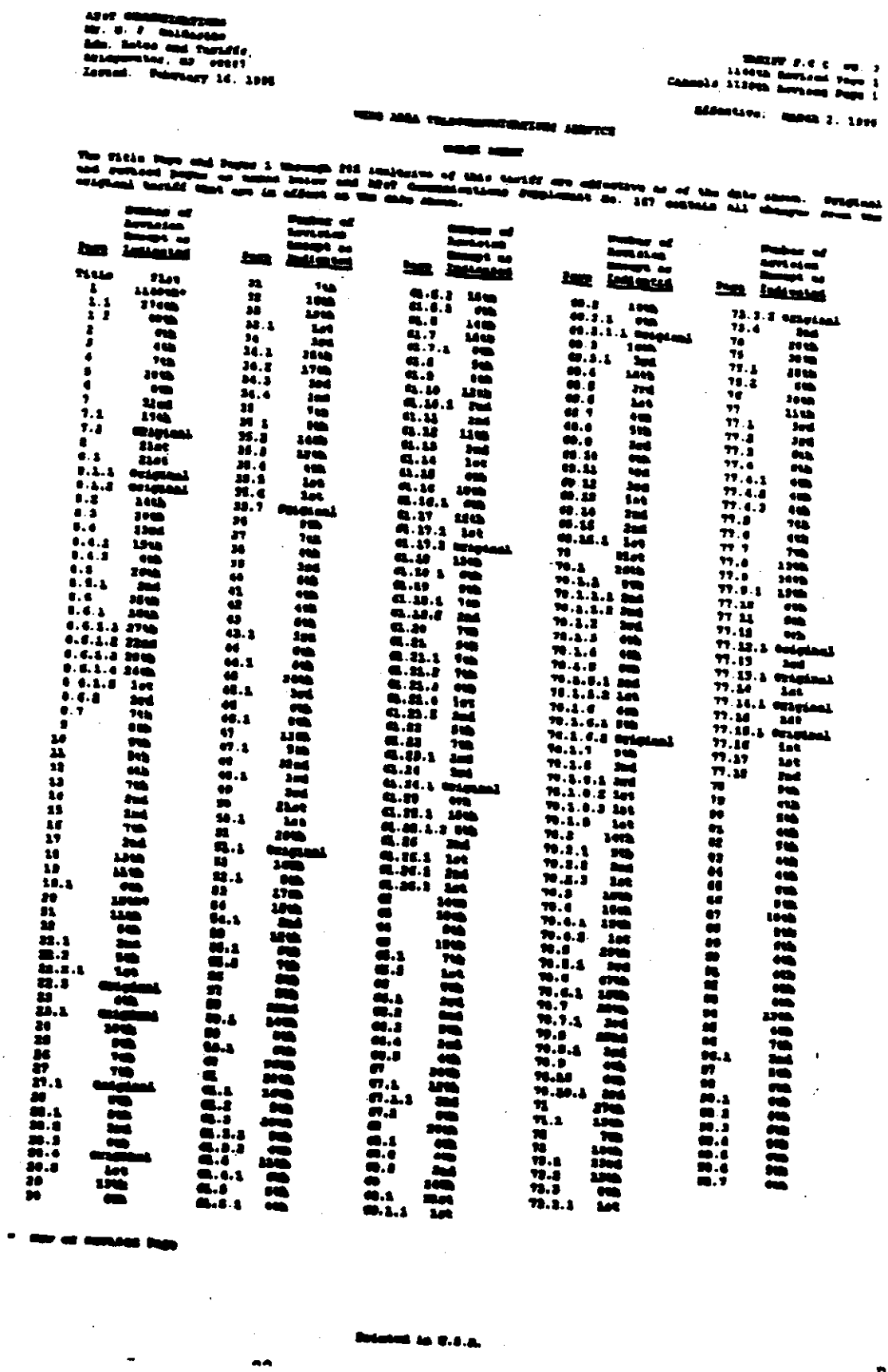
[illegible] in U.S.A.

6.2.6. Transfer or Assignment (continued)

If a Customer seeks to transfer, to one or more other Customers, all or substantially all of the locations associated with an existing Custom Network Service volume or term plan or Contract Tariff, and the anticipated result of such a transfer would be that the usage and/or revenue from the remaining locations associated with the volume or term plan or Contract Tariff (based on the past 12 months of usage) would not meet the usage and/or revenue commitment of the volume or term plan or Contract Tariff, the transfer will be deemed a transfer of the associated volume or term plan or Contract Tariff to such other Customer(s), and may only be completed in accordance with this Section. If the transfer of service is to a group of two or more other Customers, the new Customer for the volume or term plan or Contract Tariff will be that group. Each Customer in the group will be jointly and severally liable for all of the obligations associated with the transferred service and volume or term plan or Contract Tariff.

6.2.7. Multi-Location Calling Plan (MLCP) - Certain Custom Network Services are available as part of the MLCP. The terms and conditions of the MLCP are described in Section 6.9. following.

Current regulations on this page continued on Page 150.



P. 07

2.1.7. Limitations on the Provision of WATS (continued)

B. Restoration of Service - In the event of failure, WATS will be restored in compliance with Part 64, Subpart D, of the FCC's Rules and Regulations.

C. Hazardous Locations - An access line will not be furnished at a location the Company considers hazardous (e.g., explosive atmosphere environments). In such cases, the Company, if so requested, will terminate the access line at a mutually agreeable alternate location. The Customer will then be responsible for extension of the access line to the hazardous location.

2.1.8. Transfer or Assignment - WATS, including any associated telephone number(s), may be transferred or assigned to a new Customer, provided that:

A. The Customer of record (former Customer) requests in writing that the Company transfer or assign WATS to the new Customer.

B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s), including the unexpired portion of any term of service and usage or revenue commitment(s). C C

C. The Company acknowledges the transfer or assignment in writing. The acknowledgment will be made within 15 days of receipt of notification.

The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s). When a transfer or assignment occurs, a Record Change Only Charge applies (see Record Change Only, Section 3).

Nothing herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right in any 800 Service telephone number.

If a Customer seeks to transfer, to one or more other Customers, all or substantially all of the 800 numbers associated with an existing AT&T 800 Service Term Plan or Contract Tariff, and the anticipated result of such a transfer would be that the usage and/or revenue from the remaining 800 numbers associated with the Term Plan or Contract Tariff (based on the past 12 months of usage) would not meet the usage and/or revenue commitment of the Term Plan or Contract Tariff, the transfer will be deemed a transfer of the associated Term Plan or Contract Tariff to such other Customer(s), and may only be completed in accordance with this Section. If the transfer of service is to a group of two or more other Customers, the new Customer for the Term Plan or Contract Tariff will be that group. Each Customer in the group will be jointly and severally liable for all of the obligations associated with the transferred service and Term Plan or Contract Tariff. N N

2.1.9. Retention of 800 Service Telephone Numbers - Customers may retain the same 800 service telephone number when moving to another location within the Mainland or Hawaii.

STAMP & RETURN

Richard R. Mandia
Senior Attorney

Room 3250H3
295 North Maple Avenue
Basking Ridge, NJ 07920
908 221-7282
FAX 908 953-8360

February 16, 1995

David Nall, Esq.
Deputy Division Chief
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

Re: Transmittal No. 8179

Dear Mr. Nall:

AT&T submits this letter to demonstrate that there is substantial cause for applying the tariff changes set forth in Transmittal No. 8179 to AT&T customers receiving service under existing term plans and Contract Tariffs.

The Transmittal adds a paragraph to the existing sections of Tariff F.C.C. Nos. 1 and 2 governing Transfer or Assignment of service to clarify that transfer of all or substantially all of the locations or 800 numbers associated with a Tariff 1 or 2 term plan (or Contract Tariff) to another customer is deemed a transfer of the term plan (or Contract Tariff) itself, if the anticipated result of the transfer otherwise would be a significant commitment shortfall.

This filing is made in light of a reseller Customer's improper attempt to effect such a purported transfer of service (without the plan) to a third party, after its initial effort to transfer the plan resulted in a deposit requirement that it chose not to honor.

The Transmittal Clarifies Existing Tariff Terms

Although AT&T's tariffs currently support its right to refuse to complete transactions of this sort, this filing is made to preclude dispute on the matter. As a clarification of existing tariff provisions rather than a

substantive change, the proposed tariff provision should be applied to existing term plan and Contract Tariff customers without any special showing. Yet, even were the tariff revision assumed to effect a change in the rights of a customer, AT&T has substantial cause to apply it to existing term plan and Contract Tariff customers, as shown below.

Specifically, the General Regulations prohibit fraudulent means or schemes to avoid payment of tariffed charges. (Tariff F.C.C. No. 1, Section 2.2.4.B.2. and Tariff F.C.C. No. 2, Section 2.2.4.A.2.) Yet here, the Customer could nominally remain the plan (or Contract Tariff) customer of record, even though in transferring its revenue-producing accounts, it rendered itself an assetless shell, unable either to fulfill its commitments or to pay its shortfall or termination charges. The tariff prohibits such a scheme designed to avoid payment of charges.

The General Regulations further provide AT&T may require a deposit of a Customer "whose financial responsibility is not a matter of record." (Tariff F.C.C. No. 1, Section 2.5.8., Tariff F.C.C. No. 2, Section 2.5.8.A.) Because transfer of all or substantially all of its accounts to a third party constitutes a transfer of substantially all its assets, the request to transfer service constitutes a change in the "customer's financial record" such as would justify a deposit requirement. Thus, AT&T would be justified in refusing to permit the transfer if the Customer refused to pay the deposit.

In all events, the Customer's effort to segregate the term plan from the transferred service locations the tariff provision that the Customer to which service is transferred must "agree to assume *all obligations* of the former Customer." (Tariff F.C.C. No. 1, Section 6.2.6., Tariff F.C.C. No. 2, Section 6.2.6.) To the extent that the existing customer seeks to transfer all the service associated with a plan to another customer, the new customer must assume the existing customer's obligations respecting that service. Of necessity, this includes the obligations to fulfill the revenue or volume commitments of the underlying plan.

The Substantial Cause Balancing Test

Assuming, arguendo, that the tariff revisions were considered a material change in current customers' obligations, there is substantial cause to apply the new language to existing term plan and Contract Tariff

customers. "Substantial cause" exists when "the carrier's business needs and objectives" outweigh "customers' *legitimate expectations* of stability." In the Matter of RCA American Communications Inc., 86 F.C.C.2d 1197, 1201-02 (1981). "[T]he reasonableness of a proposal to revise material provisions in the middle of a term hinge[s] to a great extent on the carrier's explanation of the factors necessitating the desired changes at that particular time." Id. AT&T is filing "at this particular time" to prevent a transaction that (at a minimum) elevates form over substance in an effort to avoid payment of shortfall charges. An existing customer simply has no legitimate expectation that it could sell its service to a third party without also transferring the associated term plan, when the sale would leave the continuing obligation to pay shortfall (or termination) charges on a company with little or no remaining assets.

In all events, the Transmittal does not affect the rates applicable to existing term plan or Contract Tariff customers, and any non-rate-affecting change is minor. By contrast, the costs AT&T faces are significant. Were AT&T to grandfather existing customers, different administrative rules would apply to otherwise similarly-situated customers based only on when they entered into their term plans. Developing and implementing such rules would create needless regulatory complexities, with attendant costs and delay. AT&T should not have to create such administrative complexity simply to accommodate the desire of a customer to engage in a bad faith transfer of service.

* * *

For all these reasons, the tariff revisions should be permitted to take effect, as filed.

Very truly yours,

Richard R. Meade /ha

Richard R. Meade

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Communications	)	Transmittal No. 8179
Tariff F.C.C No. 2	)	

To: The Tariff Division,
Common Carrier Bureau

PETITION TO REJECT OR SUSPEND AND INVESTIGATE

Winback & Conserve Program, Inc. ("Winback") by its attorneys, herewith petitions the Tariff Division of the Common Carrier Bureau to reject AT&T Communications' ("AT&T") Transmittal No. 8179 as patently unlawful or, in the alternative, to suspend for the maximum five month statutory period and investigate the lawfulness of the Transmittal.

INTRODUCTION

1. Winback is an aggregator (reseller) of AT&T's 800 services under AT&T's Tariff FCC No. 2. Over approximately the past two years, AT&T has engaged in a systematic attempt to eliminate aggregation/resale in general, and Winback in particular, from the competitive marketplace for telecommunications. AT&T has been successful in its anti-resale, anti-aggregation efforts in large part due to its ability to manipulate its tariff provisions under the "guise" of "closing loopholes" in its tariffed 800 services.[1]

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[1] See AT&T Communications, Transmittals 2404 and 2535, DA 90-1545, 68 R.R. 2d 835 (1990).

2. All too often, the limited nature of the tariff review process (the rigidly narrow application of the standard of "patently unlawful" in determining whether a tariff should be rejected) has made it difficult to control or prevent such tariff manipulation. Recently, however, it has been demonstrated that the tariff review process can still be used effectively to police AT&T's manipulations shown to be "patently unlawful."[2] In support of the patent unlawfulness of Transmittal No. 8179, the following is shown.

BACKGROUND

3. AT&T's Transmittal Letter states that this "filing modifies the language pertaining to Transfer or Assignment." The revisions are proposed to §2.1.8(B) and (C). In §2.1.8(B), the customer to which service is transferred must still notify AT&T that it agrees to assume the former customer's outstanding indebtedness and the unexpired portion of applicable minimum payment period(s). However, the new customer's obligations are to be expanded to include "the unexpired portion of any term of service and usage or revenue commitment(s)" of the former customer.

4. Another revision requires that when a former customer transfers "substantially all of the 800 numbers" under a Term Plan or Contract Tariff so that the usage and/or revenue from the remaining 800 numbers no longer meet the usage and/or revenue commitment of the Term Plan or Contract Tariff being transferred, the effect is to transfer the entire Term Plan or Contract Tariff to the new customer and make both the new and former customers jointly and

---

[2] See, In the Matter of AT&T Communications, Apparent Liability for Forfeiture and Order to Show Cause, FCC 94-359 (released January 4, 1995).

severally liable for the usage and revenue commitments of the transferred Term Plan and/or Contract Tariff.

5. Further, the joint and several liability extends to one or more customers to whom the transfers are made or if made to a group of customers (two or more customers in a group) extends to the group which AT&T apparently intends to treat as a "single new customer." If there are any remaining 800 numbers left after a transfer, the determination of whether the usage or revenue commitments can no longer be met by the transferring customer (so as to require transfer of entire Term Plan and/or Contract Tariff) are to be measured by the past 12 months of usage or revenues.

ARGUMENTS

6. AT&T seeks to unilaterally impose on its existing Term Plan and Contract Tariff customers additional liability neither agreed to or negotiated with the customer; nor for which AT&T has offered any justification. AT&T's unilateral increase of the liability of its Term Plan and Contract Tariff customers violates established FCC precedent which requires a showing of "substantial cause" to change the terms of long term tariffed services.[3] See RCA American Communications, Inc., 84 FCC 2d 353, 358 (1980) (Investigation Order), 86 FCC 2d 1197, 1201 (1981) (Rejection Order), 2 FCC Rcd 2363 (1987) (Reconsideration Order); and AT&T Communications, supra.

[3] AT&T knew or should have known of this requirement and of its express applicability to its 800 service term plans. See AT&T Communications, supra. AT&T's failure nonetheless to address the need for such a showing of substantial cause demonstrates an inexcusable lack of knowledge of Commission precedent and its relevancy to this filing.

7. The obligations of a former customer upon transfer of a Term Plan was limited to unpaid charges accruing prior to transfer and a continuing obligation to meet the minimum commitments made over the unexpired portion of the term plan or contract tariff. AT&T's changes would now make the "new" customer responsible for the full run of the contract liability for the former customer's commitment even if the "new" customer's existing commitments to AT&T already exceed both the new customer's existing commitment and the former customer's commitment being transferred.

8. The Commission has ruled that carriers are entitled only to the balance of payments over the unexpired portion of the minimum service period or the carrier's unrecovered out-of-pocket costs, whichever is lesser. Investigation of Access and Divestiture Related Tariffs, CC Docket 83-1145, Phase I, 97 FCC 2d, 1082, 1173 (1984).[4] In the cited decision, the Commission found that while it was reasonable for a carrier "to take steps to mitigate any losses due to discontinuance ... where the minimum service period is greater than one month ..." the formula to apply is defined as follows -

> [T]he charges for discontinuance ... must ... provide ... in instances where the minimum period is greater than one month, ... [for] the lesser of the telco's non-recoverable costs for the discontinued service or the minimum period charges.

---

[4] See also DIAL INFO, Inc. v. AT&T, 61 R.R. 2d 242, at 244-45, n. 6 (1986). It is clear from this decision that the rulings made by the Commission in regard to the access and Divestiture related tariffs apply with equal force to AT&T.

> If as alleged By DII, AT&T is in fact routinely demanding a pre-service deposit from all its Dial-It 900 customers despite the express limitations of its revised tariff, AT&T might be in violation of our decision in Investigation of Access and Divestiture Related Tariffs, supra. [citing to 97 FCC 2d 1082, 1143 (1984) cited in paragraph 5 of the Bureau's decision in this case] (At n.6 of 61 R.R. 2d 245, emphasis added.)

AT&T's attempt to recover from the "new" customer the same commitments of the "former" customer does not comply with the formula established by the Commission for discontinuance charges.

CONCLUSION

9. Because AT&T's Transmittal No. 8179 violates established precedent by failing to make a showing of "substantial cause" and the precedent limiting its rights to mitigate its losses for discontinuance of service for minimum service periods longer than one month, the Transmittal is patently unlawful and must be rejected. In the alternative, the Bureau should suspend the Transmittal for the full statutory period and investigate its lawfulness.

Respectfully submitted,

WINBACK & CONSERVE PROGRAM, INC.

By: Charles H. Helein, Esq.
Its Attorney

Of Counsel:

HELEIN & WAYSDORF, P.C.
1850 M Street, N.W.
Suite 550
Washington, D.C. 20036
Telephone: (202) 466-0701

Dated: February 21, 1995

CERTIFICATE OF SERVICE

I, Suzanne M. Helein, a secretary in the firm of HELEIN & WAYSDORF, P.C., do hereby state that a true copy of the foregoing "Petition to Reject or Suspend and Investigate" was served, this 21st day of February, 1995, by facsimile on R. Meade at (908) 953-8360, with a copy sent First Class Mail, postage prepaid, to M.F. DelCasino, Administrator - Rates and Tariffs, AT&T Communications, 55 Corporate Drive, Room 32D55, Bridgewater, New Jersey 08807. In addition, copies were served by hand on R. L. Smith of the Tariff Division at 1919 M Street, N.W., Room 502, Washington, D.C. 20554.

Suzanne M. Helein

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter of

AT&T COMMUNICATIONS

Revisions to F.C.C. Tariff No. 1 and F.C.C. Tariff No. 2

Transmittal No. 8179

To: Chief, Common Carrier Bureau

PETITION TO REJECT OF COMBINED COMPANIES, INC.

COMBINED COMPANIES, INC.

Charles C. Hunter
Hunter & Mow, P.C.
1620 I Street, N.W.
Suite 701
Washington, D.C. 20006

Its Attorneys

February 22, 1995

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In The Matter of AT&T COMMUNICATIONS Revisions to F.C.C. Tariff No. 1 and F.C.C. Tariff No. 2	Transmittal No. 8179

To: Chief, Common Carrier Bureau

PETITION TO REJECT
OF
COMBINED COMPANIES, INC.

Combined Companies, Inc. ("CCI"), by its attorneys and pursuant to Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, hereby petitions the Common Carrier Bureau (the "Bureau") to reject the revisions to Tariff F.C.C. No. 1 and Tariff F.C.C. No. 2 filed by AT&T Communications ("AT&T") in Transmittal No. 8179 ("Transmittal No. 8179"). CCI endorses the Petition to Reject filed on this date by the Telecommunications Resellers Association ("TRA") and agrees with TRA that AT&T has failed to make the "substantial cause" showing necessary to justify the material adverse changes that the Transmittal No. 8179 tariff revisions would effect in a massive number of existing long-term service arrangements, including those held by CCI. CCI further endorses TRA's argument that the Transmittal No. 8179 tariff revisions are unlawful in that they would unjustly and unreasonably hinder the ability of

customers to "port" "800" numbers and locations among interexchange carriers and improperly interfere with the flexible conduct of customers' businesses, complicating in particular corporate acquisitions. Finally, CCI wholeheartedly subscribes to TRA's view that the Transmittal No. 8179 tariff revisions run counter to longstanding Commission policies favoring unlimited resale and sharing of common carrier services.

I.

INTRODUCTION

CCI was formed in 1994 by three long-time veterans of the "switchless resale" industry to centralize and consolidate the buying power and sales efforts of numerous small and medium size resale carriers. Through merger/acquisition and joint venture arrangements, CCI already has secured over 15 partner companies and is currently in negotiation with more than 10 other resale carriers. Moreover, CCI is also the parent company of two Florida-based "switchless resellers," Global Long Distance Marketing, Inc. ("GLDM") and National Telesis, Inc. ("NTI"), and currently has pending other resale acquisitions.

In conjunction with its partner companies, CCI currently produces long distance revenues on an annualized basis in excess of $100 million on a variety of networks and is generating new orders at an annualized rate in excess of $200 thousand a month. CCI and its partner companies provide a full range of commercial services, including custom network, "800," international, calling card and private line services, among others. Headquartered in Tamarac, Florida, CCI, in conjunction with its partner companies, maintains sales and marketing offices at locations throughout the United States.

CCI is filing here for two reasons. First, by this filing, CCI endorses and wholeheartedly supports the positions taken and the arguments made by TRA in calling for the rejection of the Transmittal No. 8179 tariff revisions. Although CCI will not repeat all of those positions and arguments here, it will highlight below certain critical themes. More importantly, however, CCI is filing here to address, and place in context, allegations made in ATT's so-called "substantial cause" showing. It is afterall, CCI's efforts to secure a Contract Tariff, assume certain "800" Customer Specific Term Plans II and move the "800" numbers associated with those plans to another IXC that has prompted Transmittal No. 8179. And lest there be any doubt, AT&T's summary recitation of the facts surrounding CCI's efforts in this regard is incomplete, highly misleading and often downright false.

On December 16, 1994, CCI, in conjunction with Group Discounts, Inc., Winback and Conserve Program, Inc. and One Stop Financial, Inc. (the "Transferors"), filed with AT&T Transfer of Service Agreements ("TSA") involving nine Revenue Volume Pricing Plans ("RVPPs")/Customer Specific Term Plans II ("CSTP IIs") (the "Plans"). In accordance with Section 2.1.8 of AT&T Tariff F.C.C. No. 2, the Transferors requested the transfer in writing and CCI agreed to assume all obligations of the Transferors. The Transferors further acknowledged that they would remain jointly and severally liable with CCI for all obligations existing at the time of the transfer. Pursuant to Section 2.1.8(C), AT&T was required to

acknowledge the transfer in writing within 15 days.[1] At AT&T's request and to accommodate AT&T personnel, CCI and the Transferors resubmitted the TSAs on December 22, 1994 and again on December 30, 1994.

On December 30, 1994, CCI received written confirmation from AT&T that TSAs associated with at least two of the Plans had been processed by AT&T. On that same date and subsequently, CCI received oral "welcoming calls" and other documentary evidence of the completed transfer of these two Plans (Verification Nos. R2617-6004 and R2617-6005), all recognizing it as the "customer of record" for the Plans.[2] Seventy-five days following their initial submission, AT&T has yet to fulfill its obligation to formally "process" the TSAs associated with the other Plans and now contends that even the two Plans it previously processed have not been transferred.

During this same time frame, CCI approached AT&T with a proposal for a Contract Tariff. Without delving extensively into the details of that proposal, it involved a commitment in excess of $200 million over a five year period, at least half of which would be "winback" traffic. The price points proposed by CCI were less than those it currently is paying under various term plans taken under AT&T Tariff F.C.C. Nos. 1, 2 and 9, but higher than the Contract Tariff rates AT&T has been compelled to make available to the "wholesale" resale

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[1] Pursuant to their terms, TSAs become effective on the latter of the effective date specified by the transferor/transferee therein or AT&T's written acknowledgement of the transfer. As a practical matter, AT&T seldom acknowledges a TSA in writing and transfers generally are deemed to be granted without further action by either party on the date specified by the transferor/transferee on the TSA.

[2] Indeed, CCI received from AT&T checks in an aggregate amount of more than $1.1 million dollars issued to it as the "customer of record" for these two Plans.

carriers from whom CCI could also obtain service. In other words, CCI's Contract Tariff proposal represented a "win/win" situation: CCI's rates would improve, and AT&T would derive a better margin from the direct provision of service to CCI than it would if CCI took service from AT&T indirectly through a "wholesale" resale carrier.

After a series of delays and no meaningful progress with respect to its Contract Tariff proposal, CCI negotiated a "stop gap" measure with Public Services Enterprise of PA, Inc. ("PSE") pursuant to which CCI would temporarily move all of the traffic on the Plans to a PSE Contract Tariff with the proviso that the traffic could be reclaimed at any time. CCI was forced to take this action because AT&T's persistent delays and refusals to deal were costing it margins in excess of $1 million a month and denying its customers access to beneficial services. In effect, CCI was negating the advantage that allowed AT&T essentially to stall negotiations indefinitely. CCI frankly informed AT&T why it was moving the traffic and continued to invite further negotiations with regard to a Contract Tariff arrangement, advising AT&T that its arrangement with PSE allowed it to reclaim its traffic at any time.

AT&T's initial strategic reaction was twofold. First, AT&T simply refused to process the service orders by which the traffic would be moved to the PSE Contract Tariff, initially on the ground that since the TSAs had not been processed, CCI was not the "customer of record" for the plans and therefore not authorized to move the traffic. When, as agent for the Transferors (the AT&T-acknowledged "customers of record" for the Plans) and pursuant to newly-enacted AT&T agency policies and procedures, CCI directed AT&T to move the traffic, AT&T simply declined to do so. At the same time, AT&T demanded a deposit from CCI in an amount in excess of $13 million dollars before it would process the pending TSAs, even though

AT&T would actually have more entities liable for term plan obligations following the transfer than before. In an effort to secure a more reasonable deposit, CCI offered to have GLDM and NTI also assume all liabilities under the Plans. CCI further emphasized to AT&T that none of the Plans were in "shortfall," that all of the Plans had annual, rather than monthly or quarterly, commitments, that each of the Plans were "restructurable" and that certain of the Plans were candidates for discontinuance without liability under a pending Contract Tariff order which PSE had already submitted to AT&T. AT&T nonetheless declined to make any adjustments.[3]

In short, the circumstance that AT&T claims justify the Transmittal No. 8179 tariff revisions was caused by (i) AT&T's refusal to negotiate a Contract Tariff in good faith, (ii) AT&T's refusal to process TSAs in compliance with its tariffs, (iii) AT&T's refusal to process orders to move "800" numbers to another carrier, and (iv) AT&T's excessive deposit demand. CCI is not attempting to defraud AT&T or to avoid any payment or obligation due AT&T under its tariffs. CCI is simply attempting to maintain and grow its business. As noted above, AT&T's suggestions to the contrary are misleading and devoid of factual basis.

II.

ARGUMENT

A. AT&T Has Not Shown "Substantial Cause" For Its Transmittal No. 8179 Tariff Revisions.

The case law is clear. A carrier may not revise its tariffs in a manner that alters the material terms and conditions of long-term service arrangements unless it demonstrates

[3] It is noteworthy that CCI has experienced no comparable difficulties or been subjected to no comparable demands from any of its other network providers.

"substantial cause" for the proposed changes.[4] In the RCA Americom Decisions, the Commission recognized the "unfairness of allowing a dominant carrier to freely change the terms of . . . a [long-term service] tariff at any time without cause, even though customers would remain bound by all provisions until the end of the service term."[5] "In balancing the carrier's right to adjust its tariff in accordance with its business needs and objectives against the legitimate expectations of customers for stability in term arrangements," the Commission developed and applied the "substantial cause" test.[6] As described by the Commission, the "substantial cause" test is "a tool for defining the appropriate zone of reasonableness applicable to changes to long-term tariffs under Section 201(b) of the Communications Act, 47 U.S.C. §201(b)."[7]

The elements which necessitate a "substantial cause" showing are all present in the Transmittal No. 8179 proposed tariff revisions. The tariff changes directly effect long-term service arrangements both under Tariff F.C.C. Nos. 1 and 2 and the thousands of Contract Tariffs which incorporate by reference the terms of these tariffs. Moreover, the multitude of customers who take service under these long-term service arrangements obviously entered into these term commitments with a "legitimate expectation[] . . . for stability in [the] term

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[4] See AT&T Communications; Revisions to Tariff F.C.C. No. 2, 5 FCC Rcd. 6777 (1990); RCA American Communications, Inc.; Revisions to Tariff F.C.C. Nos. 1 and 2, 84 F.C.C.2d 353 (1980) ("RCA Investigation Order"), 86 F.C.C.2d 1197 (1981) ("RCA Rejection Order"), 2 FCC Rcd. 2336 (1987) ("RCA Reconsideration Order"), Showtime Networks, Inc. v. FCC, 932 F.2d 1 (D.C.Cir. 1991) ("RCA Americom Decisions").

[5] RCA Rejection Order, 86 F.C.C.2d at ¶¶7 & 8.

[6] Id at ¶13.

[7] Id. at ¶4.

arrangement[]."[9] And in CCI's view, the changes AT&T proposes are not only material, but, if allowed to become effective, would have a materially adverse impact on many of those customers.

In its "'substantial cause' showing," AT&T asserts that the revisions Transmittal No. 8179 would work in the existing transfer of service requirements are a mere "clarification of existing tariff provisions rather than a substantive change." This is not the first time that AT&T has attempted such a subterfuge. In 1990, AT&T characterized proposals to alter the means by which customers could terminate "800" Service Customer Specific and Location Specific Term Plans without liability as "'clarifying' its existing tariff without changing it."[10] The Bureau summarily rejected this contention and ruled that AT&T had to "meet the substantial cause for change test adopted in the RCA Americom Decisions."[11]

Applying here the verbiage used by the Commission there, the Transmittal No. 8179 tariff revisions "would establish additional restrictions" on the ability of Custom Network Service and "800" Service term plan holders to port "800" numbers and locations to other IXCs. The

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[8] RCA Reconsideration Order, 86 F.C.C.2d at ¶13.

[9] Letter to David Nall, Deputy Chief, Tariff Division, Common Carrier Bureau, Federal Commissions Commission from Richard R. Meade, Senior Attorney, AT&T, dated February 16, 1995. It is noteworthy that the purported "substantial cause" showing offered by AT&T applies only to the additional limitations on the movement of "800" numbers and locations associated with term plans and not to the new definition of "the unexpired portion of any applicable minimum payment period(s)." Thus, to the extent that the latter change requires a showing of "substantial cause," it should be summarily dismissed.

[10] AT&T Communications: Revisions to Tariff F.C.C. No. 2, 5 FCC Rcd. 6777, ¶3 (1990).

[11] Id. at ¶¶14 & 16.

existing tariff language that AT&T seeks to modify with Transmittal No. 8179 imposes no such restrictions. The ability to port "800" numbers and locations to other IXCs "are significant aspects of a long-term service plan and cannot be changed without impact on the customer."

AT&T opines that its general tariff prohibitions against fraudulent means or schemes to avoid payment of tariffed charges subsume the Transmittal No. 8179 proposed tariff revisions, rendering these revisions mere clarifications. As AT&T is well aware, there are many reasons for porting all or substantially all of the "800" numbers or locations on a term plan to another IXC which are neither fraudulent or designed to avoid payment. AT&T's assertion that a transfer of all or substantially all of the "800" numbers or locations on a term plan to another IXC would justify imposition of a deposit has no bearing on whether or not the proposed Transmittal No. 8179 tariff revisions would effect material changes in long-term service arrangements. And AT&T's lame contention that its current requirement that the transferee of a term plan must "agree to assume all obligations of the former Customer" could be read expansively to require the transferee of individual "800" numbers or locations to assume full term plan obligations is disingenuous and almost laughable. Not only has AT&T never interpreted its tariffs in this manner, but if this were a legitimate reading of current tariff requirements, the transfer to another IXC of a single "800" number which had been associated with a term plan would trigger the assumption by that carrier of all term and volume commitments associated with the term plan. Obviously, this is a painfully absurd result that was neither intended nor can be read into current tariff language.

AT&T's "substantial cause" showing in support of its proposed Transmittal No. 8179 tariff revisions can be charitably described as half-hearted at best. Essentially, AT&T argues

that its proposed tariff changes are necessary to protect it from CCI. Even if true -- which they are not -- the allegations AT&T has directed against CCI cannot justify imposition of a material change in the long-term service arrangements of hundreds of thousands, perhaps millions, of other customers. And AT&T's unsupported, undocumented assertions that the "grandfathering" of existing requirements would generate massive costs and burdens simply cannot be lent any credence.

As AT&T has acknowledged, the Commission, when applying the "substantial cause" test, has held that changes in tariffed long-term service arrangements will be allowed only when the business needs and objectives of the carrier clearly outweigh the interests of the customers whose contractual rights are being unilaterally altered. AT&T is proposing to strip from existing customers important rights to which they are currently entitled. And in support of that proposal it has suggested only that it desires to defeat a single transaction and that it will be inconvenienced by any "grandfathering" of existing customers. The Bureau should summarily reject this painfully inadequate showing and reject the Transmittal No. 8179 for failure to demonstrate "substantial cause" for the changes proposed in therein.

B. The Transmittal No. 8179 Tariff Revisions Are Unlawful.

As TRA has pointed out, the Commission has long recognized that the ability to "port" numbers and locations to other carriers is a prerequisite to a competitive telecommunications environment. For example, before the implementation of data base access for "800" services, the Commission found that "the lack of 800 number portability . . . [was]

an impediment to full competition in 800 services."[12] And more recently, the Commission has recognized "the importance of local number portability to the promotion of competition in the local exchange market."[13] The Commission has thus made clear that no carrier "should be able to deny . . . [its] customers the benefits of number portability."[14]

CCI agrees with TRA that the Transmittal No. 8179 tariff revisions, while not prohibiting the movement of "800" numbers and locations, would have a chilling effect on their portability. Certainly, if every time traffic migrates from an AT&T term plan to another IXC, the receiving carrier is potentially exposed to the full liability associated with the plan, that carrier will undoubtedly be somewhat less eager to accept the traffic. And this is particularly so where the accepting IXC would receive only a small portion of the "800" numbers or locations on an AT&T term plan, but nonetheless be saddled with the entirety of the term plan obligation.

Moreover, the Transmittal No. 8179 tariff revisions, in addition to dampening competition by hindering the movement of traffic among competing IXCs, will introduce complications into transactions in which telecommunications services may be only a small component. AT&T should not, in its over zealous efforts to safeguard its financial interests, be able to intrude into the business affairs of its customers in such an invasive manner . AT&T, like everyone else, has access to the courts (and to the Commission) in the event that it is

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[12] Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, ¶146 (1991), recon. 6 FCC Rcd. 7569 (1991), further recon. 7 FCC Rcd. 2677 (1992).

[13] Administration of North American Numbering Plan, 9 FCC Rcd. 2068, ¶42 (1994).

[14] 800 Presubscription Rules for 800 Providers and Responsible Organizations, 8 FCC Rcd. 7315, ¶16 (1993).

damaged, and AT&T, like everyone else must accept some measure of business risk. AT&T's interests should not prevail over those of its customers or, more critically, over the public policy judgments of the Commission.

Similarly, AT&T should not be permitted to undermine the Commission's resale policies through tariff changes which incrementally, but no less effectively, hinder the ability of resale carriers to compete effectively. As the Commission has recently reaffirmed, resale of interexchange telecommunications services generates "numerous public benefits," chief among which are the downward pressure resale exerts on long distance rates and charges and the enhancements resale produces in the diversity and quality of long distance service offerings.[15]

To obtain and preserve these public benefits for consumers, the Commission long ago adopted, and continues to enforce, policies which require that "all common carriers . . . permit unlimited resale of their services."[16] To this end, the Commission affirmatively deems unjust and unreasonable, and prohibits, restrictions on resale.[17] Indeed, the Commission has recently declared that "[a]ctions taken by a carrier that effectively obstruct the Commission's resale requirements are inherently suspect."[18]

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[15] AT&T Communications: Apparent Liability for Forfeiture and Order to Show Cause, FCC 94-359, ¶12 (January 4, 1995) (citing Resale and Shared Use of Common Carrier Services, 60 F.C.C.2d 261 (1976) ("Resale and Shared Use Order"), recon. 62 F.C.C.2d 588 (1977), aff'd sub nom. American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir.), cert. denied, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Services, 83 F.C.C.2d 167 (1980), recon. 86 F.C.C.2d 820 (1981)) ("AT&T Forfeiture Order").

[16] AT&T Forfeiture Order, FCC 94-359 at ¶2.

[17] Resale and Shared Use Order, 60 F.C.C.2d at 298-99.

[18] AT&T Forfeiture Order, FCC 94-359 at ¶13.

AT&T should not be permitted to chip away at those elements of a resale carrier's business which are critical to its continued success. One of these elements is the ability to flexibly move traffic to meet commitments and realize higher margins, either individually or in conjunction with other resellers. Such movements of traffic are not undertaken with fraudulent intent; they are a normal and accepted aspect of the provision of interexchange service. They are also an essential element of survival for small IXCs that must compete in a market dominated by a single carrier and in which that carrier and two others derive more than 85 percent of customer revenues.

AT&T has already cut into this flexibility by curtailing the right of resale carriers who were not otherwise "grandfathered" to "restructure" their "800" term plans. In Transmittal No. 8179, AT&T is taking the next logical step and will continue undertaking such incremental assaults until it is stopped by the Bureau. Certainly, there is no better proof that the Transmittal No. 8179 tariff revisions are targeted at the resale community than the fact that the entire focus of AT&T's purported "substantial cause" showing is directed against CCI.

C. Transmittal No. 8179 Should Be Rejected As Ambiguous And Subject to Strategic Manipulation.

Sections 61.2 and 61.54(j) of the Commission's Rules, 47 C.F.R. §61.2 & 61.54(j), require that all tariff provisions must be clear, explicit and definitive. Ambiguous tariff provisions violate these rule sections and Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and hence are unlawful.[19]

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[19] See MCI Telecom. Corp. v. American Tel. & Tel. Co., 71 Rad. Reg.2d (P&F) 419, ¶¶20-21 (1992).

CCI agrees with TRA that the Transmittal No. 8179 tariff revisions are ambiguous in two critical respects and as a result of these ambiguities, the resultant tariff provisions would be subject to strategic manipulation by AT&T, potentially to the detriment of customers in general and resale customers in particular. First, reference is made to the "anticipated result of such a transfer" being a failure to meet the usage and/or revenue commitment under the plan from which "800" numbers or locations are being transferred. Despite the associated parenthetical that such anticipated result will be based on "the past 12 months of usage," customers would not know, and could not know, from the tariff when AT&T would perceive that a shortfall might result from a transfer. Will AT&T (or must AT&T) (or may AT&T) consider seasonality, usage trends, customer representations or like information in "anticipating the result of a transfer." Similarly, the reference to "substantially all" of the "800" numbers or locations associated with a term plan leaves AT&T wide discretion in enforcing the Transmittal No. 8179 tariff revisions. Does "substantially all" mean 99%, 98%, 95%, 90%, 80%, 75%? Because ambiguity of this nature invites discrimination, it should not be permitted .

III.

CONCLUSION

By reason of the foregoing, CCI urges the Bureau to reject as unlawful AT&T's Transmittal No. 8179 tariff revisions or, at an absolute minimum, to allow the Transmittal No. 8179 tariff revisions to become effective on a prospective basis only.

Respectfully submitted,

COMBINED COMPANIES, INC.

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February 22, 1995

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CERTIFICATE OF SERVICE

I, Penny L. Sublett, do hereby certify that on this 22th day of February, 1995, copies of the foregoing Petition to Reject of Combined Companies Inc. were mailed, by United States mail, postage prepaid to the following:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Communications	)	Tariff Transmittal No. 8179
Revisions to	)	
Tariff F.C.C. Nos. 1 and 2	)	

Petition to Reject or Suspend and Investigate

I. SUMMARY

Public Service Enterprises, Inc. ("PSE") urges the Commission to reject or suspend and investigate the tariff transmittal captioned above. The transmittal substantially changes the terms and conditions of virtually all of AT&T's long-term offerings but AT&T fails to demonstrate substantial cause for the change, as required by the RCA Americom Decisions.[1] In addition, the transmittal introduces tariff language that is vague and ambiguous in violation of the Commission's Rules, 47 C.F.R. § 61.2. Finally, the revision is unreasonably overbroad and anti-competitive on its face and thus violates § 201 of the Communications Act which prohibits unreasonable practices.

In essence, AT&T has decided to swing a meat cleaver at a splinter, rather than use existing remedies, and (by sheer coincidence of course) would

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[1] RCA American Communications, Inc., Revisions to Tariff F.C.C. Nos 1 and 2, Mem. Op. & Order, 84 F.C.C.2d 353 (1980) (order designating issues for investigation), 86 F.C.C.2d 1197 (1981) (order rejecting tariff revisions), on reconsideration, 2 FCC Rcd 2363 (1987) (RCA Americom Decisions), aff'd sub nom. RCA American Communications, Inc. v. FCC, Mem. Op., D.C. Cir. No. 81-1558 (Mar. 8, 1984). See also, Showtime Networks Inc. v. FCC, 932 F.2d 1 (D.C. Cir. 1991).

thereby chop off a long-standing, legitimate, tariffed business practice that is essential to the survival of resellers.

II. DESCRIPTION OF FILING

AT&T offers long-term discounts through a variety of term plans in its generic tariffs (Tariff Nos. 1 and 2) and through its contract tariffs. By ordering these discounted services and reselling them (unchanged or in combination with additional services AT&T may not provide) to customers who would not otherwise qualify for them individually, resellers play a crucial role in ensuring that end users benefit from rate reductions and that AT&T does not discriminate unreasonably among customers.

AT&T occasionally revises its existing offerings or introduces new discounted offerings targeted to different customer types or traffic profiles. In order to stay competitive, resellers will order new offerings and move traffic among new and old plans or among resellers to achieve the requisite traffic profile and obtain the lowest possible rate under AT&T's tariffs.

AT&T's tariffs contain a limited number of provisions that enable resellers to optimize their service mix (and thereby extend lower rates to users). Chief among these is the Transfer or Assignment provisions in Tariffs 1 and 2, which AT&T seeks to modify with Transmittal Number 8179 ("Tr. No. 8179"). These provisions enable resellers to move traffic among themselves in response to changes in end user traffic patterns or in AT&T's tariffs. By doing so, resellers can match differences in term plans' service mix, vintage, minimum revenue or

volume requirements, traffic distribution requirements, etc., with changes in the traffic patterns at different locations to obtain the lowest possible effective rate. Without these provisions, the ability of resellers to take advantage of newly-tariffed discounts would be drastically curtailed.

Transmittal No. 8179 would terminate this procedure. The transmittal adds language to the Transfer or Assignment provisions in Tariffs 1 and 2 (which also apply by cross-reference to AT&T's Contract Tariffs) that severely limits the circumstances in which resellers could shift traffic among long-term offerings. The new language would allow customers to transfer locations out of a long-term offering only if the locations remaining in the offering generated sufficient usage in the previous year to satisfy the offering's minimums. If they did not, the customer may only transfer the whole plan to another customer, even if the customer could add new locations or increase traffic from the remaining locations to satisfy its minimum commitment.

III. DISCUSSION

This transmittal is patently unlawful and must be rejected for any one of the reasons discussed below.

1. AT&T's Substantial Cause Showing is Patently Inadequate and Unpersuasive

AT&T has failed to demonstrate substantial cause for these revisions as required under the Commission's RCA Americom decisions[2] before a carrier may change the terms and conditions of a long-term offering. In those decisions,

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[2] *Id.*

the Commission balanced the customers' legitimate expectations of rate and service stability against the carrier's business needs and concluded that a carrier must demonstrate substantial cause for change if it seeks to modify long-term offerings. Applying that test to the tariff revisions under investigation in that docket, the Commission concluded that RCA Americom had demonstrated substantial cause and therefore permitted the carrier to raise its rates.

The Bureau addressed the applicability of the substantial cause test to AT&T's price caps filings when it rejected a previous AT&T attempt to change the termination liability charges for CSTPs. In AT&T Communications, Revisions to Tariff F.C.C. No. 2, Order, 5 FCC Rcd 6777 (1990), the Bureau granted petitions to reject or suspend and investigate Transmittal Nos. 2404 and 2535 on the grounds that AT&T was required to make a substantial cause showing before it could change the terms and conditions for long-term service contracts. The Bureau concluded that AT&T had failed to make a showing that satisfied the test. In its Order, the Bureau stated:

> The *RCA Americom Decisions* establish that a carrier must demonstrate substantial cause for changes in long-term service arrangements. This special showing for changes in long-term agreements was not changed by the Price Cap Rules. . . . AT&T has failed to provide a persuasive showing of substantial cause for the instant changes. Therefore, . . . these tariff transmittals are rejected for this reason.

5 FCC Rcd at 6778 (footnotes omitted).

In this case, AT&T has provided a perfunctory and unpersuasive showing of substantial cause. AT&T's showing consists of a two and a half page letter

that doesn't even reach substantial cause until the last page.[3] The showing consists of two sentences. First, AT&T states that it is filing Tr. No. 8179 to prevent a single transaction that elevates form over substance to avoid shortfall charges. Second, AT&T claims that no customer has a legitimate expectation that it could transfer locations out of a plan without transferring the plan.

AT&T's substantial cause showing is unpersuasive for three reasons. First, if AT&T's real concern is with a particular individual customer who is seeking to render itself "an assetless shell, unable either to fulfill its commitments or to pay its shortfall or termination charges,"[4] AT&T already has far more powerful remedies than Tr. No. 8179 to address that concern. AT&T itself notes in its letter that it has already tariffed provisions that protect it from the very problem that it now claims requires Tr. No. 8179. The letter notes that Sections 2.2.4.B.2. of AT&T's Tariff No. 1 and 2.2.4.A.2. of Tariff No. 2 prohibit "fraudulent means or schemes to avoid payment of tariffed charges."[5] Moreover, AT&T has extensive rights and remedies through the bankruptcy courts and traditional creditors' remedies that adequately protect its interests and dwarf the remedies

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3 The first part of AT&T's showing is an argument that no substantial cause showing is required because Tr. No. 8179 is only a "clarification." This section includes two paragraphs advancing new and novel interpretations of unrelated tariff language. Because this discussion is irrelevant to the lawfulness of Tr. No. 8179, PSE will not address it other than to note that the interpretations advanced in the Meade letter are so untenable (i.e., interpreting the deposit requirement provision to mean that a customer transferring traffic can be required to pay a deposit as a condition of processing the transfer; interpreting the transfer section to require customers to whom *locations* are transferred to assume *plan* obligations) are fully consistent with the unreasonable lengths to which AT&T is apparently willing to go to impede resale.

4 Letter from Richard R. Meade, Senior Attorney, AT&T, to David Nall, Deputy Chief, Tariff Division, FCC, at p. 2 (February 16, 1995).

5 *Id.*

available from the FCC with its limited jurisdiction. AT&T hardly needs to disrupt every contract tariff it has filed (and it has filed more than two thousand of them) and all of its term plans, when its rights as a creditor are already well protected.

Second, AT&T claims in its substantial cause showing that customers have no legitimate expectation that they can transfer traffic and not plans. In fact, AT&T itself has created that expectation by routinely processing such transfers. Moreover, such transfers, and the expectation that they will continue, serve quite legitimate and pro-competitive business purposes. Here are just a few examples of the circumstances under which customers would quite legitimately want to transfer locations and not plans, each of which would be frustrated by the changes in Tr. No. 8179:

A customer transfers substantially all of the locations in a plan to another reseller (who then qualifies for a new contract tariff with better rates for those locations, for example) and simultaneously transfers into the plan replacement traffic that exceeds its commitment levels.

A customer transfers locations as above and has excess traffic in other plans that can be moved in if the remaining locations don't generate sufficient traffic.

A customer transfers locations as above and adds new replacement locations over a two or three month period with sufficient traffic to meet the plan's minimums.

A customer transfers locations as above and knows that the traffic at the remaining locations will increase because the end user at those locations previously was splitting traffic between suppliers and now picks the reseller as its sole supplier going forward.

A customer transfers locations as above and exercises its rights under AT&T's tariffed discontinuance provisions to terminate the plan without liability, extinguishing any traffic commitment.

None of these cases would be exempted from the Draconian effect of Tr. No. 8179 because the revisions proposed therein sweep together legitimate traffic transfers and transfers for a fraudulent purpose. But there is nothing inherently sinister, and more important, there is nothing *unusual* about transfers of substantially all locations in a plan. AT&T has received and processed many such transfer requests in the past.

Third, AT&T has no substantial cause to implement the change in Tr. No. 8179 because the problem it identifies in its substantial cause showing as a justification for the transmittal isn't corrected by the revisions. AT&T's concern supposedly is that a plan holder will strip itself of assets by transferring locations to another reseller. AT&T's solution in Tr. No. 8179 is to force those locations to stay in the old plan. But AT&T cannot stop end users from presubscribing to another AT&T reseller or another facility-based IXC. Thus, a reseller can lose all of its locations even if Tr. No. 8179 takes effect. Indeed, by preventing a reseller from transferring locations to another term offering that may have a better rate, AT&T may stimulate end users to abandon its network altogether. Perhaps it hopes only that it will be able to solicit the locations as direct customers of its own service. In either case, the "solution" in Tr. No. 8179 will not accomplish the purpose AT&T claims to be serving and that purpose therefore does not justify the disruption to customers of long-term offerings.

Because AT&T has therefore failed to demonstrate substantial cause for the disruption of long-term service arrangements that it seeks to introduce through the instant filing, the Bureau must reject Tr. No. 8179.[6]

2. Tr. No. 8179 is Vague and Ambiguous

The second basis for rejecting Tr. No. 8179 is that the filing is vague and ambiguous in violation of § 61.2 of the Commission's Rules which requires tariffs to contain clear and explicit explanatory statements of the rates and regulations. As noted above, the new provision in Transmittal No. 8179 applies when "the anticipated result" of a transfer of locations would be that the remaining locations, based on usage in the preceding year, would fail to meet the minimum commitment for the offering.

AT&T does not explain what an "anticipated result" is. Whose anticipation will govern? If a reseller anticipates that it will exercise its right to discontinue an offering without liability after transferring locations and AT&T anticipates that it will not honour its tariff but will instead try to prevent a reseller from discontinuing, which anticipated result governs?

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[6] On previous occasions, AT&T has avoided rejection on substantial cause grounds by including provisions that "vintage" or "grandfather" existing plans, thus preserving the rights of current term plan customers and obviating the need for a substantial cause showing. In the instant transmittal, AT&T failed to grandfather existing plans. Moreover, in its supporting letter, AT&T complains that doing so would create "needless regulatory complexity." Apparently, this "complexity" is one that AT&T usually can handle since it has itself created innumerable vintages of contract tariffs by using (and re-opening) 90-day ordering windows. But grandfathering is no solution here in any case because the provision is so patently unreasonable. Grandfathering existing customers or offerings would only delay the disastrous injury to competition, unless AT&T is assuming that resellers will not order any offerings in the future.

Thus, the provision as drafted creates numerous problems of interpretation and application. A customer cannot ascertain from reading the tariff whether its transfer will be subject to the provision.

3. Tr. No. 8179 Introduces an Unreasonable Practice That On Its Face Violates Section 201 of the Act

Tr. No. 8179 is unjust and unreasonable on its face, and therefore unlawful, because it is unreasonably overbroad and anti-competitive on its face and thus violates § 201 of the Communications Act which prohibits unreasonable practices.

AT&T claims that the purpose of the filing is to prevent a particular transaction in which a reseller is attempting to insulate its assets from AT&T's legitimate claims for payment under tariff by "selling" its "service" to a third party and leaving itself with little or no remaining assets. But, as described in Section III.1, above, the revisions in Tr. No. 8179 would address not only this single case but *all* substantial transfers of locations from *all* plans regardless of the reseller's status or purpose. By sweeping so broadly, Tr. No. 8179 would have an anti-competitive effect on the interexchange marketplace by discouraging resale and denying access to AT&T's newest discounted offerings. Moreover, access is denied not only to resellers but to their end users as well who would be denied access to newer discounts.

Moreover, by pegging permissible transfers to past traffic levels from the remaining locations in an offering, Tr. No. 8179 effectively guts other provisions in AT&T's long-term offerings that establish *annual* commitments. Most of

AT&T's term plans and contract tariffs establish percentage discounts on the rates for generic services in return for minimum annual commitments. A minimum annual commitment ought to mean what it says; a customer has one year to generate sufficient traffic to meet its minimum. Thus, if a customer with an annual commitment transfers substantially all of the locations in the offering to another AT&T service in month two or three, for example, it has nine or ten months to generate replacement traffic under the tariff. But Tr. No. 8179 would short circuit this aspect of the offerings. Rather than give customers the annual period they bargained for, the new provision would strip the customer of its plan whenever the customer seeks to transfer substantially all of its locations, even if it is transferring *into* the plan sufficient traffic to meet its commitment. If that customer is in month two or three, "substantially all" of its locations may not yet be a large number of customer accounts.

Thus, customers with seasonal traffic spikes or those whose traffic is starting off at low levels but is growing rapidly -- neither of whom would have trouble meeting their minimums after a year -- would have to give up their plan if they tried to re-align their service mix by transferring some locations out and transferring others in. By thus gutting the minimum annual period that is central to the rationale for long-term offerings, Tr. No. 8179 introduces provisions that are unreasonable on their face and the Bureau should reject it.[7]

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[7] Alternatively, the Bureau could suspend and investigate the Transmittal. If it chooses to do so, the Bureau should investigate AT&T's actual practices with respect to transfers of locations and the specific transfer it cites in its pleading. The Bureau should direct AT&T to answer specific questions and produce documents related to the circumstances of this filing. In particular, the

CONCLUSION

AT&T's Tr. No. 8179 fails to demonstrate substantial cause to justify the changes to long-term service arrangements proposed therein. Moreover, the proposed revision is vague, ambiguous and unreasonable on its face. Therefore, the Bureau must reject the transmittal.

Respectfully submitted,

Colleen Boothby /cgm

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Dated: February 22, 1995

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Bureau should investigate how many transfers of substantially all locations AT&T has honoured in the past; the number and frequency of discontinuances requested (and implemented) in the wake of such transfer requests; the incidence of location transfers by customers who subsequently defaulted on their term commitments; and, with respect to the particular transaction cited by AT&T in its pleading, the evidence available to AT&T regarding the likelihood that the transferring customer would default on its term commitment and the timing and extent of AT&T's knowledge regarding PSE's role in the transaction. In particular, AT&T should explain why it was willing to transfer two of the plans without controversy but refused to transfer the others once a TSA to PSE was submitted.

CERTIFICATE OF SERVICE

I, Leah Moebius, hereby certify that on this 22nd day of February, 1995, true and correct copies of the foregoing Petition to Reject or Suspend and Investigate AT&T's Revisions to AT&T F.C.C. No. 1 and AT&T F.C.C. No. 2, Transmittal No. 8179 were served by facsimile, hand delivery, or first class mail upon the following parties:

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**By hand delivery

105.01 8179svc.doc

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corp.	)	Tariff Transmittal No. 8179
	)	
	)	
Revisions to Tariff	)	
F.C.C. Nos. 1 and 2	)	

REPLY OF AT&T CORP.

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February 27, 1995

SUMMARY

Transmittal 8179 simply clarifies that transfer of all or substantially all of the locations or 800 numbers associated with a term plan (or Contract Tariff) constitutes a transfer of the plan itself, when it will likely result in a commitment shortfall. The filing was made in response to an existing Customer's announced intent to transfer substantially all its locations (without the associated term plans) to a third party, after its initial effort to transfer the plans themselves to a different customer (which had no established credit history) resulted in a deposit request that was not honored.

AT&T filed these revisions to clarify its existing tariff rights, not to change them. AT&T already has the right to protect itself against shams such as that being attempted here under two provisions of the General Regulations of Tariff F.C.C. Nos. 1 and 2: the prohibition against fraudulent means or schemes to avoid payment of tariffed charges, and the deposit requirement for a customer "whose financial responsibility is not a matter of record."

AT&T made these revisions now to inform customers specifically how AT&T will interpret and enforce the tariff so that customers cannot claim that they "innocently" developed business plans based on mistaken expectations of how the tariff would be enforced.

In all events, moreover, AT&T has shown substantial cause for the filing. Indeed, were this one customer to abandon its existing term plan commitments in an assetless shell, rendering AT&T unable to collect shortfall charges, AT&T would suffer revenue losses exceeding $100 million.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
AT&T Corp.	)	Tariff Transmittal No. 8179
	)	
	)	
Revisions to Tariff	)	
F.C.C. Nos. 1 and 2	)	

REPLY OF AT&T CORP.

Pursuant to Section 1.773(b) of the Commission's Rules (47 C.F.R. § 1.773(b)), AT&T Corp. ("AT&T") hereby replies to the seven petitions to reject or suspend and investigate the above-referenced revisions to Tariff F.C.C. Nos. 1 and 2.[1] The petitions entirely fail to justify rejection or suspension of the tariff revisions.[2]

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[1] Petitions to Reject or Suspend and Investigate were filed by Advanced Telecommunications Network, Inc. ("ATN"), Combined Companies, Inc. ("CCI"), Public Services Enterprises of Pennsylvania, Inc. ("PSE"), Tel-Save, Inc. ("Tel-Save"), Telecommunications Reseller Association ("TRA"), The Furst Group, Inc. ("TFG"), and Winback & Conserve Program, Inc. ("Winback & Conserve") (collectively, "Petitioners").

[2] To justify rejection, a petitioner must prove that a tariff is unlawful on its face because it demonstrably conflicts with the Communications Act or a Commission rule or order. See, e.g., American Broadcasting Companies Inc. v. FCC, 633 F.2d 133, 138 (D.C. Cir. 1980); Associated Press v. FCC, 448 F.2d 1095, 1103 (D.C. Cir. 1971); MCI v. AT&T, 94 F.C.C.2d 332, 340-41 (1983). To overcome the presumption of lawfulness and justify suspension, moreover, the petitioner must show each of the following: (1) that there is a high

(footnote continued on following page)

Factual Background

Transmittal 8179 adds a paragraph to the existing sections of Tariff F.C.C. Nos. 1 and 2 on Transfer or Assignment of Service to clarify that transfer of all or substantially all of the locations or 800 numbers associated with a Tariff 1 or 2 term plan (or Contract Tariff) to another customer itself constitutes a transfer of the term plan (or Contract Tariff), but only when the transfer is anticipated -- based on the customer's actual usage history (viz., the past 12 months of usage at the remaining locations) -- to result in a commitment shortfall.

As noted in AT&T's letter accompanying the transmittal,[3] the filing was made in response to a Customer's announced intent to transfer substantially all its locations (without the associated term plans) to a third

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(footnote continued from previous page)

probability the tariff would be found unlawful after investigation; (2) that the suspension would not substantially harm other interested parties; (3) that irreparable injury will result if the tariff filing is not suspended; and (4) that the suspension would not otherwise be contrary to the public interest. Section 1.773(a)(iv) of the Commision's Rules, 47 C.F.R. § 1.773(a)(iv). None of Petitioners has made either showing.

[3] Letter from Richard R. Meade, Senior Attorney, AT&T to David Nall, Deputy Chief of the Commission's Common Carrier Bureau, Tariff Division dated February 16, 1995, at 1 ("Feb. 16 Letter").

party, after its initial effort to transfer the plans themselves to a different customer (which had no established credit history) resulted in a deposit request that was not honored.

CCI notes (CCI Petition at 3-6) that it is the Customer that declined to post the deposit, and that Petitioner Winback & Conserve (along with two other loosely-affiliated resellers, One Stop Financial, Inc. and Group Discounts, Inc.) are the current customers of the term plans. CCI further identifies still a third Petitioner, PSE, as the intended ultimate recipient of the accounts being transferred.[4] While these points are correct, other parts of CCI's rendition of facts are both inaccurate and misleading.

This is not the first time Winback & Conserve's management has attempted to use corporate forms to avoid

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[4] In an unrelated transaction, the corporate affiliate of yet a fourth Petitioner had sought to transfer to that Petitioner all the accounts (except one) under an existing CSTP II while the affiliate retained legal liability for the plan commitment. The plan is in a critical commitment shortfall situation, with a multi-million dollar shortfall liability likely to come due imminently. Had the requested transfer been completed, the affiliate would have stripped itself of substantial future accounts payable, leaving AT&T to collect the liability from a company with a significantly diminished capacity to pay. After this Petitioner filed its Petition, the affiliate instead transferred the entire plan to the Petitioner.

legal obligations. AT&T has had an unusually litigious relationship with both Winback & Conserve and its corporate predecessor, One Stop Financial, Inc. ("OSF").[5] By April, 1992, AT&T had become aware of OSF's massive sales effort to take unfair advantage of AT&T's brand name and marketplace reputation by misrepresenting itself as affiliated with AT&T in calls on potential customers. AT&T then applied for an injunction under the Lanham Act in the United States District Court for the District of New Jersey. In apparent compliance and contrition, OSF agreed to the entry of a Consent Injunction in May 1992.

But OSF's management did not cease its deceptive marketing tactics. Instead, OSF's principal formed a new corporation, Petitioner Winback & Conserve, and renewed the misrepresentation campaign under that different -- and supposedly separate -- corporate identity. By late 1993, AT&T had gathered sufficient evidence of Winback & Conserve's new Lanham Act violations to obtain a Temporary Restraining Order from the same District Court.[6] When, however, AT&T sought to convert the TRO to a Preliminary

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[5] At times, collectively referred to as "Inga's companies," after Winback & Conserve's principal, Al Inga.

[6] Because OSF and Winback & Conserve had identical management, AT&T has also sought a contempt citation against OSF for this transparent violation of the earlier Consent Injunction. That matter is still pending.

Injunction, the District Court accepted Winback & Conserve's argument that it should not be held liable because the individuals who made the misrepresentations were not employees of Winback & Conserve but "independent contractors." AT&T appealed this ruling to the Third Circuit, which reversed and remanded the District Court's denial of AT&T's request for a Preliminary Injunction.[7]

In mid-December, 1994, with its management aware that the "easy money" gained by deceptive marketing practices and corporate identity subterfuges had just about run its course, Winback & Conserve attempted to cash in on its customer base by selling off the customer list and transferring its existing plans to another reseller. When AT&T received the Transfer of Service Agreement ("TSA") forms required for such plan transfers, it was perfectly willing to complete with the transfers.

However, the transferee (CCI) was a newly formed corporation, without an established payment history with AT&T. What's more, CCI simultaneously submitted to AT&T another set of TSAs which would have transferred substantially all of the end users (i.e., 99.92% of the 10,000 or so end-users) on those CSTP II plans -- but not the lead accounts which create the plan structure -- to PSE.

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[7] See American Telephone & Telegraph Company v. Winback & Conserve Program, Inc., 42 F.3d 1421 (1994).

Clearly, CCI was just a strawman through which the real transaction between the Inga companies and PSE would pass. Given this lack of prior financial history, the size of the plans (approximately $54 million in annual revenue commitment), and CCI's announced intent to dispose of the traffic (thereby putting itself in imminent default of the tariffed commitments), AT&T invoked its tariff right to seek a three-months' deposit from CCI -- in the amount of $13,540,000 -- before establishing service.

To avoid posting a deposit, CCI furnished AT&T a January 31, 1995 letter of agency purporting to appoint CCI as agent for Inga's companies, instead. CCI then attempted to accomplish the transfer to PSE by leaving the plan structure with Inga's companies and sending the traffic directly to PSE. Apparently, it would now be Inga's companies (instead of CCI) that would default, be disconnected and declare bankruptcy.[8] AT&T would not honor this appointment for a number of reasons. First, Winback & Conserve had already appointed an agent, and AT&T's tariffs do not permit a customer to appoint multiple agents for services under the same tariff. Second, the agency

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[8] This is not speculation. Mr. Inga has already indicated to a number of AT&T personnel his desire to leave the aggregation business and close his offices, as well as his willingness to allow his companies to go bankrupt instead of paying AT&T.

arrangement was developed to permit resellers to "outsource" the day-to-day management of certain of their plans, and not to provide a vehicle for frustrating AT&T's tariffs. Finally, the true intentions of the participants had been expressed to AT&T through their own previously submitted documents.

Since that time, moreover, AT&T has learned that Mr. Inga contacted AT&T's billing office in Pittsburgh (instead of his AT&T representatives in the Minneapolis aggregation center), and falsely told AT&T's billing clerks that a number of these plans had undergone a simple "name change" to CCI. When the Minneapolis center learned that AT&T's billing records had been changed based on this new misrepresentation by Mr. Inga, the billing records change was reversed.

The Transmittal Properly Clarifies AT&T's Existing Tariff Right to Prevent Fraud

As explained in its Feb. 16 Letter, AT&T filed these revisions to clarify its existing tariff rights, not to change them. AT&T already has the right to protect itself when a customer seeks to transfer the locations (but not the commitment) associated with an AT&T term plan or Contract Tariff to a third party if, as a result, the customer's net value and ability to pay tariffed charges would be significantly diminished. Thus, the purpose of the filing is not to expand AT&T's existing rights or the

customer's obligations beyond what they now are; it is, rather, to inform customers specifically how AT&T will interpret and enforce the tariff so that customers cannot claim that they "innocently" developed business plans based on mistaken expectations of how the tariff would be enforced.

AT&T's right to protect itself against shams such as that being attempted here arises under two provisions of the General Regulations of Tariff F.C.C. Nos. 1 and 2: the prohibition against fraudulent means or schemes to avoid payment of tariffed charges,[9] and the deposit requirement for a customer "whose financial responsibility is not a matter of record."[10] Specifically, the fraud provisions prohibit the use of service "with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by ... [u]sing fraudulent means or devices, tricks [or] schemes ...."[11] AT&T may "temporarily restrict" the service of any customer engaged in such prohibited

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[9] See Tariff F.C.C. No. 1, Section 2.2.4.B.2. and Tariff F.C.C. No. 2, Section 2.2.4.A.2.

[10] Tariff F.C.C. No. 1, Section 2.5.8.; Tariff F.C.C. No. 2, Section 2.5.8.A.

[11] See Tariff F.C.C. No. 1, Section 2.2.4.B.2. and Tariff F.C.C. No. 2, Section 2.2.4.A.2.

behavior.[12] Here a customer is employing a scheme to remain the plan customer of record while transferring all or substantially all of its assets (viz., substantially all of its revenue-producing locations) to a third party; it thus can render itself unable either to fulfill its commitments or to pay its shortfall or termination charges, and thus "avoid payment of charges." In such event, AT&T may "restrict" or "suspend" the customer's right to transfer service.[13]

Clearly, moreover, transfer to a third party of all or substantially all of the accounts under a single term plan or Contract Tariff may well constitute not just a significant reduction in assets (the continuing stream of accounts receivable), but a concomitant increase in liabilities, as well, given the increased likelihood of a substantial commitment shortfall charge. Thus, the transfer could well result in a significant reduction in the net value of the customer. Such a change in the customer's "financial record" would itself justify a deposit requirement. Under these circumstances, AT&T may refuse a

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[12] Tariff F.C.C. No. 1, Section 2.9.2.; see Tariff F.C.C. No. 2, Section 2.8.2. ("temporarily suspend").

[13] At least one Petitioner concedes this point. PSE Petition at 5.

transfer if the Customer refuses to pay a required deposit.[14]

Even though AT&T's Feb. 16 Letter demonstrated that the tariff revisions seek only to thwart schemes in which the transfer of locations without plans is done to avoid payment of charges or when the transfer would significantly change the financial "record" of the customer, some Petitioners argue that the tariff revisions are broader than necessary to address the problem identified.[15] These arguments are based either on a misunderstanding of the

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[14] As noted in the Feb. 16 Letter, the existing Transfer or Assignment requirement that the new Customer assume "all obligations" of the former Customer affords AT&T additional protection. If the former Customer is transferring substantially all of the accounts associated with a plan it of necessity assumes the term plan obligation as well. In a classic reductio ad absurdum argument, TRA and CCI erroneously maintain that transfer of individual numbers or locations similarly should require assumption of plan commitments, too. AT&T does not argue that the transfer of only one, or a few, locations would require the receiving customer to assume any term plan obligations.

[15] Conversely, PSE claims that the revisions fail even to correct the problem that gave rise to the filing. PSE observes that AT&T cannot stop an *end user* from switching carriers, with the result that the reseller could still be rendered assetless. While this observation is true, AT&T is not seeking to thwart legitimate end user-initiated activity. In rare circumstances, there might be such a pattern of legitimate end user flight from a particular reseller that its financial health could change significantly. In the event of such a major change in financial circumstances, though, existing tariff provisions would justify any necessary deposit.

effect of the pending revisions or a mischaracterization of the nature of some of the hypothetical examples.

Thus, PSE and TRA argue (PSE Petition at 6, TRA Petition at 14-15) that a customer may wish to transfer the 800 numbers or locations, but not the associated plan, because it will use other traffic to meet the commitment or will terminate the plan with or without liability. The tariff revisions would not apply under these conditions because the "anticipated result" of the transfer would not be a commitment shortfall, so long as the replacement traffic is added or the plan is terminated prior to (or concurrently with) the transfer of service.[14]

Others assert that the revisions should be rejected because AT&T did not obtain the prior consent of every Contract Tariff customer (Tel-Save Petition at 3; TFG Petition at 5). This is absurd. Typically, Contract

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[14] PSE, TRA and TFG also assert the customer may choose in good faith to pay the shortfall charge (or assume the risk of doing so if it is unable to bring in sufficient replacement traffic prior to the commitment attainment date. PSE Petition at 6, TRA Petition at 14-15; TFG Petition at 7, 11 & 14. The examples used by Petitioners for the most part deal with situations where a transfer would not likely result in a shortfall, and thus are unaffected by the tariff. Moreover, while some customers may wish to create "shell" plans with no underlying traffic, that is not what term plans or CTs are designed for, and the tariff requirement that the commitment be transferred along with the transfer of all or substantially all associated locations is perfectly reasonable.

Tariffs provide that the terms of AT&T's underlying tariffs apply "as amended from time to time."[17] Thus, even assuming that the current transmittal represents a substantive change -- which it does not -- Contract Tariff customers have expressly agreed to be bound by changes to the underlying tariffs that can be made without the consent of the Contract Tariff customer.

Some Petitioners also argue that the revisions are vague in that the transfer of "all or substantially all" of the 800 numbers or locations in a plan requires a transfer of the plan, as well, if the "anticipated result of such a transfer ... (based on the past 12 months of usage)" is that

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[17] See, e.g., Contract Tariff No. 374, Section 5.D.:

> "Except as otherwise provided, the rates and regulations as set forth in AT&T Tariff F.C.C. No. 1, pertaining to SDN and AT&T Tariff F.C.C. No. 2, pertaining to 800 Services will apply, *as these tariffs may be amended from time to time.*"

See also, e.g., Contract Tariff No. 54, Section 6.A.:

> "Except as otherwise provided in this Contract Tariff, the rates (subject to Section 7 following), regulations, terms and conditions of AT&T Tariff F.C.C. No. 1, *as amended from time to time*, pertaining to SDN, will apply."

The cross-reference here to "Section 7 following" reflects that amendments to the stabilized rates in Section 7 require the prior consent of the Contract Tariff customer. The Contract Tariff Customer has no special right, however, to block changes to rates, terms and conditions set forth in Tariff F.C.C. No. 1 itself.

the customer would fail to meet its commitment. The revisions refer to a transfer of "substantially all" of the accounts in a plan rather than specifying an arbitrary quantity or percentage of locations or usage to eliminate the potential for subterfuge that an arbitrary number would invite.[18] Any "ambiguity" in this formulation, moreover, provides customers, at the least, better guidance than the current tariff, and falls short of mathematical precision only because AT&T cannot predict realistically the various artifices some customers may employ to avoid paying their bills.

Likewise meritless are Petitioners' quibbles about the term "anticipated result." It is quite reasonable to determine the "anticipated result" of a transfer based on the customer's actual "run rate" over the past 12 months[19]

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[18] CCI and TRA suggest AT&T should specify the precise percentage of locations or 800 numbers being transferred that would trigger the obligation to transfer the plan as well. CCI Petition at 14; TRA Petition at 18. Unfortunately, though, a customer seeking to abandon a commitment in an empty shell could create sufficient low-volume or no-volume accounts to meet the formality of a percentage requirement, and complete the transaction with impunity.

[19] The 12 month period was used to negate the impact of seasonal variations and other anomalies. Some Petitioners have raised a concern about how this provision would apply in a plan that is less 12 months old. In this event, all of the actual usage would be considered since it is all within the past twelve months.

at the remaining locations only. Including projected growth through addition of new locations, as a number of Petitioners suggest,[20] would improperly compel AT&T to subsidize the customer's "bet" that wished-for growth will materialize to replace the transfer of virtually all its existing traffic.[21]

Substantial Cause Exists for Any Change

As noted, although the filing is not intended to (and does not)[22] change the existing tariff rights of AT&T and its term plan customers, AT&T has shown substantial cause for the filing. Two Petitioners attack the substantial cause showing on the erroneous basis that AT&T failed to explain why these changes are necessary at this

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[20] CCI Petition at 14; PSE Petition at 6; Tel-Save Petition at 7-8; TFG Petition at 13; TRA Petition at 16.

[21] At the same time, if the historic usage at a given remaining location has shown significant growth over the past twelve months, the projection would emphasize the current higher usage level, not an average level.

[22] TRA and CCI wrongly claim the revision to Tariff 2 established a restriction on the ability of customers to "port" 800 numbers to other carriers. TRA Petition at 9; CCI Petition at 8-9. The individual end-user customer's right to move to another 800 service provider is, however, unaffected by the revisions. In fact, the right to "port" a specific 800 number has never had anything to do with transferring the underlying service itself (such as AT&T 800 READYLINE Service). It has never been necessary for an end-user to change its 800 number it the AT&T service used by a reseller to provide service to that end user is transferred to another reseller.

"particular time."[23] As initially described in the Feb. 16 Letter and amplified in the Factual Background above, the revisions have been made at this time because of Winback & Conserve's recent efforts to separate liabilities from assets in a way that could frustrate AT&T's ability to collect shortfall charges. Petitioners' argument that Winback & Conserve's recent misrepresentation was entirely "foreseeable" and should have been anticipated in earlier filings is, at best, disingenuous. While AT&T certainly would contest the claim that it should be able to foresee each and every fraudulent scheme unscrupulous customers might devise, this is irrelevant in any event for two reasons. First, the current transmittal leaves the existing provision on fraudulent schemes unchanged. Second, the substantial cause test does not require lack of foreseeability before permitting a carrier to change existing tariff terms.[24]

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[23] Tel-Save Petition at 5; TFG Petition at 10. See In the Matter of RCA American Communications Inc., 86 F.C.C.2d 1197, 1201-02 (1981). "[T]he reasonableness of a proposal to revise material provisions in the middle of a term hinge[s] to a great extent on the carrier's explanation of the factors necessitating the desired changes at *that particular time*." (Emphasis added).

[24] "Substantial cause" exists when "the carrier's business needs and objectives" outweigh "customers' legitimate expectations of stability." In the Matter of RCA American Communications Inc., 86 F.C.C.2d 1197, 1201-02 (1981). In Showtime Network, Inc. v. FCC, 932 F.2d 1 (D.C. Cir. 1991), the Court of Appeals upheld a tariff

(footnote continued on following page)

Some Petitioners also assert that AT&T has not shown how it would be financially affected if the revisions are not permitted to take effect. To the contrary, though, CCI's Petition itself acknowledges that Winback & Conserve's attempted evasion of the requirement alone would force AT&T to forego $13 million of security deposits needed to protect itself against potential losses of shortfall revenues. Should Winback & Conserve isolate its $54 million annual commitment in an assetless shell and AT&T be unable to collect shortfall charges over the term of these plans, AT&T would need to write-off, as bad debt, losses exceeding $100 million.

(footnote continued from previous page)

revision made under the substantial cause test, noting that the tariff change was justified by certain "unforeseen" events, such as the rate of inflation from 1979-81 and the loss of a satellite). These events, while unforeseen at the time of contracting, were clearly foreseeable.

* * *

For all of the foregoing reasons, the Petitions to Reject or Alternatively Suspend and Investigate should be denied, and the pending tariff revisions should become effective, as scheduled.

* * *

Respectfully submitted,

AT&T CORP.

By: /s/Richard R. Meade

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Dated: February 27, 1995

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I, Rita Foxwell, hereby certify that on this 27th day of February 1995, true and correct copies of the foregoing Reply of AT&T were served upon the following parties in the manner indicated:

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